

NO. PD-0283-16

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

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ON APPEAL FROM THE COURT OF APPEALS FOR
THE NINTH DISTRICT OF TEXAS AT BEAUMONT

NO. 09-14-00137-CR

ROGER DALE VANDYKE, *Appellant-Petitioner*

v.

THE STATE OF TEXAS, *Appellee-Respondent*

Arising from: **Cause No. 13-03-03344-CR**

IN THE 435 DISTRICT COURT,
MONTGOMERY COUNTY, TEXAS

STATE'S APPELLATE BRIEF

BRETT W. LIGON
District Attorney
Montgomery County, Texas

BRENT CHAPPELL
Assistant District Attorney
Montgomery County, Texas
T.B.C. No. 24087284
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
brent.chapell@mctx.org

Oral Argument Requested

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.2, the State hereby supplements the appellant's list of parties to this appeal with the names of all trial and appellate counsel for the State:

District Attorney:

BRETT W. LIGON
District Attorney
Montgomery County, Texas
207 W. Phillips, Second Floor
Conroe, Texas 77301

Counsel for the State in the trial court:

BRETT HOBBS
Former Asst. District Attorney

Counsel for the State in the appellate courts:

BRENT CHAPPELL
Assistant District Attorney
Montgomery County, Texas
207 W. Phillips, Second Floor
Conroe, Texas 77301

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TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The appellant was charged with the offense of violating the conditions of his civil commitment as a sexually violent predator (1st Appeal C.R. 17–21).¹ The indictment included allegations of three prior felony convictions for purposes of enhancement of punishment (1st Appeal C.R. 20). Pursuant to a plea agreement, the appellant pleaded guilty to the offense as charged and “true” to the enhancement paragraphs (Plea R.R. 8). The trial court found the appellant guilty, found the allegations in the enhancement paragraphs to be “true,” and assessed his punishment at imprisonment for twenty-five years (Plea R.R. 8–9). The trial court certified the appellant’s right to appeal only as to the constitutionality of the statute and the matters regarding enhancements (2d Appeal C.R. 16).

On February 10, 2016, the Ninth Court of Appeals unanimously affirmed the trial court’s judgment in a published opinion authored by Chief Justice Steve McKeithen. *See Vandyke v. State*, 485 S.W.3d 507, 513 (Tex. App.—Beaumont

¹ There are two clerk’s records in this case, because the case was first appealed pretrial after the trial court denied the appellant’s application for writ of habeas corpus. After the appellant pleaded guilty and the trial court certified his right to proceed on a regular appeal, this Court dismissed the appellant’s first appeal as moot. *See Ex parte Van Dyke*, No. 09-14-00092-CR, 2014 WL 2152130 (Tex. App.—Beaumont May 21, 2014, no pet.) (mem. op., not designated for publication).

2016, pet. granted). The Ninth Court of Appeals denied the appellant's motion for rehearing on April 5, 2016, and mandate issued on May 3, 2016.

On July 27, 2016, this Court granted the appellant's petition for discretionary review, and the Ninth Court of Appeals recalled its mandate of affirmance on July 28, 2016.

STATEMENT OF FACTS

After serving time in prison for convictions of sexual assault and aggravated sexual assault, the appellant was determined to be a sexually violent predator and was civilly committed. The appellant judicially confessed to violating the conditions of his order of civil commitment on forty-three separate grounds. Each of those grounds constituted a failure to comply with the course of treatment and requirements imposed by the appellant's case manager and the Office of Violent Sex Offender Management.

SUMMARY OF THE STATE'S ARGUMENTS

The Ninth Court of Appeals correctly held that the legislative decriminalization of the appellant's conduct after he was lawfully convicted constitutes a violation of the separation of powers doctrine. The retroactive application of the newly-enacted Texas Health and Safety Code sections 841.082 and 841.085 unconstitutionally assumes the clemency power assigned to the executive in article IV, section 11 of the Texas Constitution.

REPLY TO POINT OF ERROR

The appellant argues that his judgment of conviction should be reversed in light of the recent legislative amendments to the civil commitment program (Appellant's Brief at 2).

A. The legislature effectively pardoned the appellant by retroactively decriminalizing his conduct.

“A pardon has been defined as an act of grace exempting the individual on whom it has been bestowed from the punishment that has been assessed against him or her by the court.” *Ex parte Hernandez*, 165 S.W.3d 760, 762 (Tex. App.—Eastland 2005, no pet.) (citing *Ex parte Lefors*, 303 S.W.2d 394, 397 (Tex. Crim. App. 1957)). A pardon is a remission of guilt. *Sanders v. State*, 1 S.W.2d 901, 902 (Tex. Crim. App. 1928).

While the appellant's appeal was pending, the 84th Texas Legislature overhauled the statutory program for the civil commitment of sexually violent predators when it passed Senate Bill 746. The Act, which went into effect on June 17, 2015, made substantial changes to Chapter 841 of the Texas Health and Safety Code. *See* Act of May 21, 2015, 84th Leg., R.S., ch. 845, §§ 19, 44, 2015 Tex. Gen. Laws 2700, 2707-12 (current version at Tex. Health & Safety Code Ann. §§ 841.082, .085 (West, Westlaw through 2015 R. Sess.)). Among those changes, the Act amended sections 841.082 and 841.085 to decriminalize the conduct for which the appellant was convicted. *Id.*

To explain, Senate Bill 746 reflects the following revisions to section 841.082:

SECTION 13. Sections 841.082(a) and (b), Health and Safety Code, are amended to read as follows:

(a) Before entering an order directing a person's ~~[outpatient]~~ civil commitment, the judge shall impose on the person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community. The requirements shall include:

(1) requiring the person to reside where instructed ~~[in a Texas residential facility under contract with the office or at another location or facility approved]~~ by the office;

(2) prohibiting the person's contact with a victim ~~[or potential victim]~~ of the person;

(3) ~~[prohibiting the person's possession or use of alcohol, inhalants, or a controlled substance;~~

~~[(4)]~~ requiring the person's participation in and compliance with the sex offender treatment program ~~[a specific course of treatment]~~ provided by the office and compliance with all written requirements imposed by the ~~[case manager or otherwise by the]~~ office;

(4) ~~[(5)]~~ requiring the person to:

(A) submit to tracking under a particular type of tracking service and to any other appropriate supervision; and

(B) refrain from tampering with, altering, modifying, obstructing, or manipulating the tracking equipment; and

(5) ~~[(6)]~~ prohibiting the person from ~~[changing the person's residence without prior authorization from the judge and from]~~ leaving the state without ~~[that]~~ prior authorization from the office~~;~~

~~[(7) if determined appropriate by the judge, establishing a child safety zone in the same manner as a child safety zone is established by a judge under Section 13B, Article 42.12, Code of Criminal Procedure, and requiring the person to comply with requirements related to the safety zone; and~~

~~[(8) any other requirements determined necessary by the judge].~~

Act of May 21, 2015, 84th Leg., R.S., ch. 845, § 13, 2015 Tex. Gen. Laws 2700, 2704-2705 (current version at Tex. Health & Safety Code Ann. § 841.082 (West, Westlaw through 2015 R. Sess.)). Thus, as important here, the legislature eliminated the existing provision in subsection (a)(3) and redesignated the requirement provided in former subsection (a)(4)—that the person must participate in and comply with a specific course of treatment—to subsection (a)(3).

The legislature also amended the penal provision, set out in section 841.085 of the Code, to allow prosecution for only four of the remaining five requirements that a person subject to a civil commitment order must follow pursuant to section 841.082. In particular, section 841.085 was revised as follows:

SECTION 19. Section 841.085(a), Health and Safety Code, is amended to read as follows:

(a) A person commits an offense if, after having been adjudicated and civilly committed as a sexually violent predator under this chapter, the person violates a civil commitment requirement imposed under Section 841.082(a)(1), (2), (4), or (5) [841.082].

Act of May 21, 2015, 84th Leg., R.S., ch. 845, § 19, 2015 Tex. Gen. Laws 2700, 2707 (current version at Tex. Health & Safety Code Ann. § 841.085 (West, Westlaw through 2015 R. Sess.)).

Subsection (a)(3) is conspicuously absent from that list. It is undisputed that the appellant was prosecuted for violations of his civil commitment order that fall under former subsection (a)(4), which now appears under subsection (a)(3). Thus, assuming the legislature’s failure to include subsection (a)(3) in the criminal penalty provision was intended, the plain language of the new statute effectively decriminalizes the conduct for which the appellant was convicted.

Critically, the legislature also included a savings provision in the Act:

The change in law made by this Act in amending Section 841.085, Health and Safety Code, applies to an offense committed before, on, or after the effective date of this Act, except that a final conviction for an offense under that section that exists on the effective date of this Act remains unaffected by this Act.

Act of May 21, 2015, 84th Leg., R.S., ch. 845, § 41, 2015 Tex. Gen. Laws 2700, 2711. Therefore, assuming “final conviction” in this context does not encompass convictions that are still pending on appeal,² the legislature expressly

² The aforementioned assumptions derive from the recent opinion by the El Paso Court of Appeals in *Mitchell v. State*, 473 S.W.3d 503 (Tex. App.—El Paso 2015, no pet.), which the appellant principally relies upon in his petition for review. In *Mitchell*, the court analyzed whether the legislature intended to eliminate prosecutions for violating the requirements imposed by the case manager and Office of Violent Sex Offender Management, and whether the term “final conviction” in the Act’s savings provision includes convictions that are pending on

decriminalized the appellant's conduct and retroactively applied the newly-amended provisions to the appellant's conviction despite the jury's finding of guilt and the trial court's judgment of conviction that occurred while the former version of the statute remained in effect. This was, in effect, an act of grace forgiving the appellant for his conduct and exempting him from the punishment assessed by the jury. The enactment amounts to a pardon.

B. The legislature's effective pardon improperly assumed the executive branch's clemency power.

The Texas Constitution includes an express separation-of-powers provision:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, § 1. It has “long been a maxim of constitutional law” that “a power which has been granted to one department of government may be exercised

appeal. *See Mitchell*, 473 S.W.3d at 504. The court concluded that the legislature's “clear and unambiguous” language showed they did, in fact, intend to eliminate prosecutions of that nature, and also that a conviction is not “final” when it is pending on appeal. *Id.* at 513–17. Based on these conclusions, the court ultimately held that the Act decriminalizing certain violations of the sex offender civil commitment requirements applied retroactively to a defendant whose convictions were not final at the time of the Act's effective date. *Id.* at 517. Notably, however, the court did not address the legislature's power to enact those provisions under the Separation of Powers Clause.

only by that branch to the exclusion of others.” *State ex rel. Smith v. Blackwell*, 500 S.W.2d 97, 101 (Tex. Crim. App. 1973). “And any attempt by one department of government to interfere with the powers of another is null and void.” *Id.* This Court has held repeatedly that the separation of powers provision may be violated in either of two ways: (1) “when one branch of government assumes, or is delegated, to whatever degree, a power that is more ‘properly attached’ to another branch,” or (2) “when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.” *Safety Nat. Cas. Corp. v. State*, 273 S.W.3d 157, 162 (Tex. Crim. App. 2008) (emphasis in original omitted).

When the legislature enacts a statute, it exercises a power “properly attached” to the legislative branch of government. *Jones v. State*, 803 S.W.2d 712, 716 (Tex. Crim. App. 1991). A constitutional problem arises, however, when a legislative enactment interferes with the core functioning of another branch of government in a field constitutionally committed to the control of that branch. *Id.* Put another way, “the legislature may not interfere with the core functions of the judicial or executive branches without running afoul of separation of powers.” *Tex. Comm’n on Envtl. Quality v. Abbott*, 311 S.W.3d 663, 675 (Tex. App.—Austin 2010, pet. denied); *see also Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (legislature may not interfere with core judicial functions).

Article IV, section 11 of the Texas Constitution grants to the governor the power, “after conviction” and upon recommendation of the Board of Pardons and Paroles, to grant reprieves and commutations of punishments and pardons. Tex. Const. art. IV, § 11. In other words, the executive branch holds the exclusive power to grant commutations and pardons. *Blackwell*, 500 S.W.2d at 101; *see also Ferguson v. Wilcox*, 28 S.W.2d 526, 532 (Tex. 1930) (where power is expressly given by Constitution and means for exercise thereof is prescribed, such means are exclusive of all others). Although the Texas Constitution grants a limited power of clemency to the courts insofar as they can suspend a sentence and place a convicted person on probation, *see* Tex. Const. art. IV, § 11A, this limitation does not encompass the executive branch’s general authority to grant commutations and pardons. *Blackwell*, 500 S.W.2d at 101. More importantly, the Texas Constitution contains no similar grant of authority to the legislature.

Accordingly, “courts have had occasion to strike down any encroachment by other branches of government upon the power granted to the executive by the people.” *Id.* For example, in *Blackwell*, this Court addressed the constitutionality of a provision in the Texas Controlled Substances Act that applied to any person convicted of an offense involving marihuana. *Id.* Section 4.06 mandated that, upon the request of any convicted person—whether currently serving a sentence, on probation or parole, or after discharge from a sentence—the trial court must

resentence the person according to the reduced standards set forth in the remaining sections of the Act. *Id.* at 104. Because the provision resulted in a less severe punishment for those who had been convicted, the enactment amounted to a “commutation” despite being labeled as “resentencing.” *Id.* Therefore, the legislature exceeded its power in enacting section 4.06. *Id.*; *see also Ferguson*, 28 S.W.2d at 535 (declaring unconstitutional a legislative act that provided for a pardon of a former impeached governor); *Ex parte Gore*, 4 S.W.2d 38 (Tex. Crim. App. 1928) (holding that executive branch solely holds the power to discharge convicts before they have served their terms, and therefore statutory designation of that power upon other officials was invalid).

Mere months later, this Court revisited the Controlled Substances Act’s infringement on the governor’s clemency power, and clarified what “after conviction” means as provided in article IV, section 11 of the Texas Constitution. *See Ex parte Giles*, 502 S.W.2d 774, 784 (Tex. Crim. App. 1973). In *Giles*, the Court addressed the legislature’s authority to retroactively apply the Controlled Substances Act to cases pending on appeal. Section 6.01(c) of the Controlled Substances Act provided:

In a criminal action pending, on appeal, or commenced on or after the effective date of this Act, for an offense committed before the effective date, the defendant, if adjudged guilty, shall be assessed punishment under this Act if he so elects by written motion. . . .

Id. at 781. In essence, the provision required the trial court to sentence a defendant whose conviction was pending on appeal in accordance with the new sentencing guidelines although those guidelines did not come into effect until after the commission of the offense. *See id.*

Similarly to the appellant in this case, Giles argued that the provision did not infringe upon the governor’s clemency power because the term “after conviction” in article IV, section 11 refers only to “a final conviction in the sense that a mandate of affirmance has been issued by the Court of Criminal Appeals or that no appeal has been taken from a conviction.” *Id.* at 783–84. Therefore, he argued, “until there is such a final conviction there can be no infringement upon the Governor’s constitutional powers to grant pardons, commutations, etc.” *Id.* at 784.

But this Court disagreed, observing that “the authorities are clearly contrary to [Giles’s] contention.” *Id.* The Court reasoned that the use of the same term in article IV, section 11A of the Texas Constitution strengthens the construction that “after conviction” merely refers to the verdict of conviction and judgment on the verdict. *Id.* Section 11A provides that “after conviction,” certain courts may suspend the imposition or execution of a sentence and place defendants on probation. *Id.*; *see also* Tex. Const. art. IV, § 11A. Clearly, a trial court need not wait until the final mandate of affirmance is issued to suspend a sentence and place a defendant on probation. Thus, this Court concluded, the legislature exceeded its

power in retroactively applying the Controlled Substances Act's sentencing guidelines to cases still pending on appeal: "To hold otherwise would be to announce that the Legislature has the authority to invest trial courts with the power to grant commutation, etc., 'after conviction' upon written request, thus usurping the powers granted to the Governor by the Constitution." *Giles*, 502 S.W.2d at 786; *see also Satterwhite v. State*, 36 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (declining to construe statute permitting the prosecutor to move the trial court to "dismiss a criminal action at any time" as authorizing dismissal of a final judgment because such an authorization "would effectively and unconstitutionally allow judicial officers to exercise the power of commutation, a form of executive clemency vested exclusively in the executive branch of government").

Likewise, the retroactive application of newly-enacted sections 841.082 and 841.085 of the Health and Safety Code unconstitutionally usurp the clemency power granted to the executive branch by the Texas Constitution. Like the resentencing guidelines in the Controlled Substances Act, the decriminalization of the appellant's conduct after the trial court entered a judgment on the jury's guilty verdict amounts to a legislative grant of clemency. Because any grant of clemency that occurs "after conviction" falls solely within the power of the governor, the legislature improperly assumed with the executive's effective exercise of its

constitutionally-assigned power. In effect, that power has been foreclosed as to individuals who have been convicted of violating an order of civil commitment and have successfully delayed the finality of their convictions by pursuing the appellate process. Thus, the legislature's assumption of the executive branch's constitutionally-granted power is null and void as a violation of the Separation of Powers Clause.

The appellant attempts to distinguish *Giles* from this case on its facts:

The illegal provision in **Giles** authorized the Judiciary to hold hearings to actually change the punishment either a finally convicted individual (sic) or someone whose case was still on appeal. In Petitioner's case, all the savings clause did was to decriminalize the conduct for which Petitioner was convicted prior to his conviction being final.

(Appellant's brief at 12). The appellant has apparently identified a single distinction: the provision in *Giles* altered the punishment, while the provision in this case altered the conviction itself. But such a distinction is inconsequential. The power to reduce punishments—i.e., commutations—and the power to excuse a conviction—i.e., pardons—are *both* constitutionally delegated to the executive branch when exercised “after conviction.” Given this Court's interpretation of the phrase “after conviction” to include cases pending on appeal, the reasoning in *Giles* prevails in this case.

The appellant also contends, “[t]his Court has consistently held that when a statute is repealed and no other penalty is substituted, offenders against the

repealed law were exempt from punishment except where a conviction had become final prior to the repeal” (Appellant’s brief at 13). But the cases upon which the appellant relies examined article 14 of the Penal Code of 1925, which contained the following provision:

The repeal of a law where the repealing statute substitutes no other penalty will exempt from punishment all persons who may have violated such repealed law, unless it be otherwise declared in the repealing statute.

See Mendoza v. State, 460 S.W.2d 145, 146–47 (Tex. Crim. App. 1970); *Waffer v. State*, 460 S.W.2d 147, 148–49 (Tex. Crim. App. 1970); *see also Williams v. State*, 476 S.W.2d 145 (Tex. Crim. App. 1972). Crucially, that provision has since been repealed, and only the constitutional grant of clemency power upon the executive branch remains.

Moreover, the decisions in *Mendoza*, *Waffer*, or *Williams* predate this Court’s decision in *Giles*, and none of them considered the effect of invalidating a finding of guilt and judgment of conviction during the pendency of an appeal in the context of separation of powers. That issue appears to be novel, yet this Court addressed its similar counterpart in *Giles*. Under *Giles*, the executive holds the exclusive power to grant clemency “after conviction”—that is, upon the finding of guilt and entry of judgment by the trial court. Because no constitutional provision authorizes the legislature to invalidate a conviction by repealing the applicable statute while the conviction is pending on appeal, the legislature unconstitutionally

usurped the power of the executive branch. *See Hernandez*, 165 S.W.3d at 763 (legislature does not have the power to interfere with the governor’s right to grant a pardon by the repeal of a statute). Any conflicting authority is not controlling.

Given the limited scenarios in which the amended civil commitment scheme will unconstitutionally usurp the executive’s clemency power, this Court need not deem the entire Act unconstitutional. The only portion of the Act that violates separation-of-powers principles is the retroactive application of the amendments to cases currently pending on appeal. To remedy this problem, this Court could diverge from the *Mitchell* court and construe the term “final conviction” from the savings provision to refer to the entry of judgment on a guilty verdict. Alternatively, this Court could invalidate the savings provision entirely. Under either result, the appellant is not entitled to have his conviction set aside based on the new amendments.

This Court should deny the appellant’s sole ground for review.

CONCLUSION AND PRAYER

It is respectfully submitted that all things are regular and the judgment of the court of appeals should be affirmed.

BRETT W. LIGON
District Attorney
Montgomery County, Texas

/s/ Brent Chapell
BRENT CHAPPELL
T.B.C. No. 24087284
Assistant District Attorney
Montgomery County, Texas
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
936-788-8395 (FAX)
brent.chapell@mctx.org

CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Tex. R. App. P. 9.4(i)(2)(B) because there are 3,328 words in this document, excluding the portions of the document excepted from the word count under Rule 9(i)(1), as calculated by the Microsoft Word computer program used to prepare it.

/s/ Brent Chapell
BRENT CHAPELL
Assistant District Attorney
Montgomery County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served electronically on Mr. Scott Pawgan, counsel for the appellant-petitioner, to the e-mail address of scottpawgan@yahoo.com, on the date of the submission of the original to the Clerk of this Court.

/s/ Brent Chapell
BRENT CHAPELL
Assistant District Attorney
Montgomery County, Texas